United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7181

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FOLEY SQUARE
NEW YORK, NEW YORK 10007

#76-7181
C/A Index No.

B

P/S

REPLY of Albert E. McFerran Jr. PRO SE to the Briefs filed with the U.S. Court of Appeals by,

(1) Respondent School District: Board of Education Enlarged City School District of Troy, N.Y.

Lettko of Counsel

(2) Respondent Attorney General, Lefkowitz, for the Commission of Education of the State of New York.

REPLY

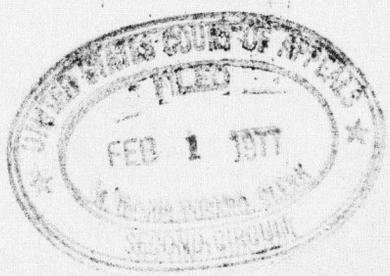
IN THE MATTER OF THE APPEAL OF

Albert E. McFerran Jr. PRO SE
Tenured teacher,
Enlarged City School District
Troy, N.Y. 12180

appellant

(Albert E. McFerran Jr.
131 Clermont Street
Albany, New York 12203)

-against-



The Board of Education
Enlarged City School District
Troy, New York 12180

(Lettko
5 First Street
Troy, New York 12180, attorney)

respondent

-and-

The Commissioner of Education
State of New York
University of the State of New York
Washington Avenue
Albany, New York

respondent

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Exhibits

Cases Cited in this Reply

Statement of Facts

Appellant is a tenured teacher in the Enlarged City School District of Troy, New York. Since the date of his initial employment in December 1963, appellant has been systematically defrauded of wages to the now estimated sum of $20,000(twenty thousand)to which must be added related pension benefits under the New York State Teachers Retirement system. This sum does not include money and wage losses since January 8, 1975 the date of the "indefinite" suspension mentioned throughout the Appellant's Brief and the herein REPLY.

In the fall of 1971(seventy-one) appellant confirmed one of the major items of his wage loss in the certification of the District's failure to pay me in 1970 for a Longevity payment which was due to him for his service in the district, according to both EL Sections 3101, 3102(6), 3104 and the Teachers Agreement both then and now in existence. Commencing in 1971,all statutory, contractural and First and Fourteenth Amendment rights have been denied to the appellant in his attempt to have this matter resolved. Actions directed to the resolution of the problem have included an appeal to the Commissioner of Education, Ewald Nyquist, who in February of 1973 issued CD #8608 which compounded all of the violations up-to-then placed against the appellant by issuing a false decision at variance with previous decisions issued by him in the matter dating back to 1969(Brief), the position in such case(s) being confirmed as to the correctness of the Commissioner's in Court of Appeals Decision School District v. Nyquist 38 NY 2d 137, such decision additionally confirming the Brief of the said Commissioner submitted to the court for this matter, such Brief which confirmed the vesting of rights of such teachers to such statutory benefits as when originally conferred upon entrance into a district's service.

Throughout this matter the appellant has attempted to use both his teacher organization and the statutory prescribed grievance procedure. He has not only been repulsed, but through the conspiracy of Lettko, McGinn and the Board of Education, together with the Commissioner of Education and his infamous Counsel Stone, been placed on an "indefinite", illegal suspension, subjected to five months of terrorism, then resuspended(SECOND SUSPENSION) five months after the "indefinite" illegal suspension of January 8,1975, placed on false and malicious charges for alleged activities which primarily took place during the period of the "indefinite" suspension, then coerced and intimidated into a Compromise and Settlement Agreement which gave no legal consideration and was per se contrary to the PUBIC POLICY of the State of New York. With the preferring of the malicious charges, appellant took the matter to the U.S. Northern District Court, Albany, New York, for for the fundamental relief of,

1. Action by the Court against the Compounded suspension, (a) January 8, 1975
   (b) May 5, 1975

   such action being contrary to EL 3020-a (1) and (2) since as a tenured teacher appellant had been illegally suspended on January 8, 1975 under EL 2508(5) which,

   (1) denied him his 14th amendment rights pertinent to equality and protection of law
   -and-
   (2) the "indefinite" suspension of January 8, 1975 had been placed against the appellant without CAUSE being first found by the Board of Education as mandated by the protection due him under 3020-a (1)(2) as a tenured teacer in the Stateof N.Y.

From ab initio fraud and hoax were the components of the action of the Board, aided and abetted by the Commissioner of Education, his Counsel Stone, and now in conclusion the Attorney General of

the State of New York Louis Lefkowitz.

2. The Northern District Court was asked not only relative to the component of the fraudulent "indefinite " suspension which denied to the appellant his tenure rights, but also to convene a three-judge panel relative to the Constitutionality of the identified sections of 3020-a. As admitted in the Memorandum-Decision and Order of J. Foley, February 26, 1976, 75-CV265, the Northern Court took jurisdiction over the matter on "May 28, 1975. ...asserting jurisdiction pursuant to 28 U.S.C. #1343(3) and 42 U.S.C. #1983..."(page 2, Foley Decision). Subsequent to this on July 11, 1975 and alleged Compromise and Settlement Agreement was induced upon the appellant to sign, otherwise the Board of Education was scheduled to defraud him of his tenured position, since the Board recognized that it by that time had misappropriated some thousands of dollars in pursuing its hoax against the tenured teacher and rather than risk public exposure for their criminal actions insisted on employing the subterfuge of "Compromise and Settlement" to escape from their responsibility in misappropriation of public funds.

When the appellant then continued his action in Federal Court, attorney Lettko then on September 25, 1975, submitted to the Northern District Court, his own sworn affidavit, page 4(see appellant's Brief page 14 onward)informing the court that it lacked jurisdiction, as per Paragraph #12 of the Compromise and Settlement Agreement that he, Lettko, had written for the Board of Education. On December 1, 1975 and on February 12, 1976 Lettko again submitted papers to the Northern Court challenging jurisdiction over the "agreement", finally in his papers of February 12, 1976 Lettko

on page 14, again reminds the Court again on the jurisdiction of Rensselaer County Court, as per his paragraph #12, but now asks the court to assume jurisdiction over the "plaintiff's performance and the defendant BOARD's performance under said agreement of 7/11/75..." this, of course in violation of the "agreement itself(unilaterally) and also the Matter of Patrone 237 NY 394, wherein, "Jurisdiction of subject matter of an action cannot be conferred by consent."

Contray then to the obvious intent of Lettko to deny the Northern District Court of J. Foley jurisdiction on this matter, contrary to the Brief filed on my behalf asking that the Agreement be ignored in consideration of the Matter of Boyd v. Collins 11 NY 2d 228, in spiteof the obvious violation of Article I, Section 10, of the U.S. Constitution, Article 4, Section, 1 of the U.S. Constitution, and in spite of the prohibitions of the 10th amendment to the U.S. Constitution, J. Foley took jurisdiction over the subject matter of the Agreement, rendering a decision which is not only null and void for wanting jurisdiction but if permitted to stand will destroy basic relationships and constitutional rights as among citizens, citizens and states, states and the Federal government itself. Lettko, Stone(Nyquist) and the Attorney General of the State of New York--- the attorneys as officers of the Court---now attempt to seduce this U.S. Court of Appeals into approving such a monstrosity, a producit of their conspiracy against the very law they have sworn to uphold. In conscience, the Court is asked to reverse this decision as guardians of the law and the people of the United States.

Point 1: Lettko and the Attorney General have Affirmed the lack of jurisdiction of J.Foley of the "agreement"

Commencing with the Statement of Issues on page 13 of his Brief, Appellant herein addressed himself to the Northern District's Court (1) lack of jurisdiction, (2) public policy in NYS on the matter of private agreements contra statute and decisional determination, (3) due process and the agreement, (4) the biased and incompetent decision of J. Foley represented by his memorandum-decision of February 26, 1976, and (5) the issues in the original complaint of May 28, 1975 which were neither faced nor decided as admitted by J. Foley in his said decision as follows:

Foley Decision, p. 2,

> "It must be emphasized that this decision will be primarily concerned with the enforcement of the agreement discontinuing this instant litigation."

Foley Decision p. 5,

> "Since other federal courts have passed on issues similar to those that the plaintiff raises,(constitutionality of EL NYS 3020(a)) I believe that it would be appropriate to make some breif comments on these decisions without purporting to render a decision on the merits of this litigation."(emphasis added)

Folev Decision p. 7,

> "In sum, the separate motions of the defendants are granted dismissing the complaint pursuant to the terms of the agreement that agreed to its discontinuance. "

Neither of the respondent-appellees has claimed that J. Foley had jurisdiction,contrary to the position taken and sustained by the herein appellant. By default, therefore, the appellant assumes his position to be correct and that he is sustained in this position

by CPLR(NYS) #3018 Responsive pleadings which in part reads:

> "(a) Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.

Again, both appellees have omitted any challenge to the vital jurisdictional question, even when raised and extensively developed by the appellant, yet both speak of the agreement. The respondent school district's attorney, in fact, appears to raise no other issue than the agrement claiming that,

(1) It is valid, real.... p. 14+(SD Brief)

(2) Nothing...invalidates...agreement, p. 27+(SD brief)

(3) Agreement...should not be disturbed, p. 44+ (S/D B)

Validity, of course, depemds essentially on jurisdiction, and since by omission and default it is admitted as being nonexistent, then there is no agreement. Mr. Lettko's actions confirm this position:

(1) He has moved in neither federal nor state court to direct compliance with his "agreement", particularly in federal court where he has claimed that J. Foley has endorsed his "agreement" in its"entirety," a claim he did not make in this Brief. Considering also the sum of money he alleged that the appellant benefited from due to his and the board's largess this must be considered either (a) negligence, (b)a recognition that he has claimed the benefits of a decision from a court which he knows has no jurisdiction in the matter, thus he has elected a remedy source without authority or judicial power.

The Attorney General colaterally informs the court that the matter has become"moot" By reason of the Settlement Agreement". Truly a criminal statment in view of his oath of office, his status as an officer of the Court, the statutory and decisional law of New York State, the Taylor Law and collective agreements etc. He Even

mentions the status of retired public pensioners of which the appellant is not one, but which the Attorney General thinks him to be or hopes him to be.(Familiarity with the facts??) The Attorney General does confirm a lack of jurisdiction pertinent to the matter of the agreement, however, and this is done on page 4 of his abbreviated brief:

> "In the present case, of course, the District Court had acquired jurisdiction before(emphasis added) the Compromise and Settlement Agreement was executed,...

What the Attorney General admits is that original and final jurisdiction was acquired on May 28, 1975(cited) and admitted by J. Foley, p. 2, " This action was commenced by plaintiff pro se on May 28, 1975... pursuant to 28 U.S.C. #1343(3) and 42 U.S.C. #1983..." The "Agreement"was to come into criminal existence on July 11/15 1975 and is nothing less than the itemization of criminal actions to protect the misappropriation of the funds which had been used from January 8, 1975 by the Board, and various public officials; subsequent to its existence as per its date of July 11/15 it is both an explanation and verification of the attempts of those involved for the Board to hidethe matter and then to implicate in their crimes Judges Foley, Williams and Miner in their respective actions. The statement admits of the retroactive application of jurisdiction of J. Foley and his lack of authority for so doing, and hence implicitly acknowledges the lack of any "agreement" under the laws of the state of New York and its public policy.

Since there is no jurisdiction to sustain the Foley Decision, both appellees are really asking an appellant court to assume original jurisdiction on the matter. As these attorneys know the U.S. Supreme Court long ago spoke on such an issue in the Matter of Marbury v. Madison 1 Cr. 137(1803).

As is well known, even the Supreme Court has original jurisdiction only in cases "affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be a party." Since NYS cannot be a "party" to such an agreement herein considered since its courts have declared such "agreements" statutorily and decisionally null and void, and since Lettko and his conspirators are fortunately neither Ministers nor Consuls it is apparent that the primacy of the U.S. Constitution must prevail and that the U.S. Court of Appeals for the Second Circuit has in the case at hand to which the appellant has "appealed" has only appellate powers since, as per Marbury v. Madision,

> "...If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction to be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance..."

I question the power of this or any court to challenge the answer on jurisdiction given in Marbury v. Madison.

Point 2: The Cases cited by the Respondent-appellees are generally not germane, or falsely cited

Lettko , Point 1, Agreement, valid...real...

Boyd v. Collins 11 N.Y. 228, note that Lettko attempts to beg on the matter of tenure rights and go to the tangent of "dismissal" Admits of Tenure rights of which continuity of service(liberty) is primary, not to be interrupted by either "indefinite" suspension of dismissal.

McFerran v. CSD#1 15 NY 2 630

Attached as Exhibit #2 is the letter of Febraury 5,1963 from the alleged attorney of the herein appellant to one Rowley. Note that the "without prejudice" is an after thought to a letter conveying a resignation, after the resignation had occurred. The Courts interpreted the statement"without prejudice" to be a vacatur of innocence not an agreement. Note how Lettko has omitted part of the letter in order to make the statment appear to be an "agreement of discontinuance", although the court stated that the matter was "already mooted."

In the Cedar Case, 30AD 2 882, Lettko again neglected to inform the court that a resignation was a matter of fact prior to some $4,500 being given as consideration. When this occurs, the position of the Courts is then reflected in the

Matter of Doering v. Hinrichs 289 NY 29,33

" A resignation constitutes a complete break in the service and the absolute termination of relations. Thereafter the person resigning has no right and duties. Reentry into service can be accomplished only the voluntary act of the person who has power of appointment."

In the CD Berke and Loiacono #8545, 8456, both of the parties involved were Superintendents and as such were involved in term contracts under EL 2507. Tenure as an issue was not discussed; in our issue tenure, as admitted by Lettko, is vital to this entire matter--tenure and its rights under EL 3012,3013 and 3020-a, also admitted by J. Foley.

The Matter of the Teachers of Huntington 30 NY 2d 122 was related to 3020-a in that through a collective agreement a teacher was given a third, added,option to a decision of the Board from a 3020-a hearing: 1. Commissioner, 2. 78 Proceeding 3. Arbitration. There was no individual contract, or the ignoring of grievance procedures for some four years--now seven. In this instance, my tenure rights are to be restricted not added to or augmented.

In the St. Mary's Hospital v. Catherwood 26 NY 2d 493 the public policy of arbitration for hospital workers was sustained as from a collective agreement.

Both of the appellees rely on Arnett v. Kennedy 416 U.S. 134(1974), the Attorney General claiming that this case"has laid to rest " the claim that "suspension on charges prior to a hearing violates an employee's right to due process." The appellant on page 3 of his Complaint to the Northern District Court, dated May 22, 1975 admitted under #15 that,

> "..."3020-a(2) of the Education Law of the State of New York permits the suspension of the plaintiff pending 'a hearing(trial)on the charges and the final determination thereof."

The Matter of Jerry v. Board of Education of Syracuse 35 NY 2d 534, stated that suspension must be accompanied with pay, but it did not authorize suspension with pay but without following the due process procedures established under 3020-a to reach the position of said suspension.

The suspension of Jerry must be assumed to have followed the procedural due process of 3020-a as established by law:

1. written charges on a tenured teacher
2. cause being found by the board on the charges
3. then--suspension--if so stiuplated by the board.

In the case herein involved we have:

1. "indefinite"suspension by an unauthorized person
2. "indefinite" suspension by a statute 2508(5) inapplicable to a tenured teacher
3. retroactive endorsement of the suspension illegally placed against the tenured teacher
4. cause never found under the suspension of 2508(5) as per the protection of a tenured teacher.

This is the issue: an unauthorized suspension, inapplicable statute, cause not being found, tenured protection statute denied and then five months later using 3020-a procedures as a coverup for the illegal "indefinite" suspension of January i, 1975. Arnett v. Kennedy followed due process procedures as stipulated for it; in our case due process procedures under 3020-a, as prescribed, were not followed for a tenured teacher.

Uniquely, we have a merging of the talents of Lettko and the Attorney General, the merging being, of course, resulting in contradiction. Boddie v. Connecticut 401 U.S. 564 is used by Lettko to develop the concept that one must remain at impasse with the law and while using his constitutional rights of equality and protection in one aspect he is to be denied a rightful challenge to a law(even the same law) if another aspect is actually limiting his legal rights. Yet, both he and the Attorney General feel free to use the Kinsella cases 378 F Supp 54; 402 F. Supp 1155 to supplement their positions on the finality of the correction of the Regulations of the Commissioner of Education pertinent to 3020-a hearing procedures. They neglect to mention that while Kinsella was under charges by EL 3020-a, was protected,I believe,with his legal protections which ensued for several months, a decision was finally made that indeed there was unconstitutionality present in the matter of the hearing record procedures and dec ision to be rendered thereon. While adjudged unconstitutional in one aspect, the mandated elements of protection under 3020-a (1) and (2) particularly were retained and the Court did not challenge the right of Kinsella to retain them while another part of the statute was being challenged. Thus, with Boddie v. Connecticut and the pained deduction drawn from it by Lettko and, previously I believe, the Attorney General.

One final comment on Lettko's citations. We are told on page 40 of his Brief that in reference to the Matter of Peterkin, CD 8121, 1970 Ed Dept Report 160-161, that EL 3013(3) upon which Peterkin was based has been repealed and replaced by section 3020-a, and that Peterkin "in no way holds that the subsequent charges under 3013(3) were invalid."

The issue, of course, that was taken to the Commissioner was on the suspension. We know from the case nothing on the charges and the Commissioner was not, as per #8121, requested to rule on them. We quote from the case, p. 160

> "The board claims that EL 3013(3) does not require that a statment of charges be served simultaneously with the suspension of a teacher. Rather, respondent argues that subsequent service of charges relates back and ratifies the prior suspension.
> I do not agree." (Nyquist, Commissioner of Ed)

As to Lettko's statement that 3013(3) was "repealed and replaced" should have read repealed to be replaced by 302a-a

EL 3013(3)	3020-a (1) (2)
All charges against a person enjoying the benefits of tenure as provided in this section shall be in writing and shall be made to the board of education...The person charged may be suspended by the district superintendent of schools or the principal until the determination of the charges by the board of education.	1. Filing of charges ..all char against a person enjoying the benefits of tenure as provided ...three thousand thirteen.. shall be in writing and filed with the clerk of the board (2) The employee may be suspended pending a hearing on the charges and the final determination thereof.

The substance was to increase the protection of the teacher not to "repeal"it. One is not suspended prior to be charged. This is the legal protection due to a tenured teacher.

Point 3: Points 1 and 2 of the Brief of the Attorney General are premature.

The Points raised by the Brief of the Attorney General (1) mootness, (2) constitutional question, are premature since as admitted by J. Foley he did not discuss for final decision the issues of valid due process procedure in the matter of the initial suspension of January 8, 1975, and did not enter into the merits of the defects of 3020-a as cited in particular sections in the original complaint of the appellant on May 22, 1975.

Foley Decision p. 2,

> "It must be emphasized that this decision will be primarily concerned with the enforcement of the agreement discontinuing the instant litigation."

Foley Decision, p. 5,

> "Since other federal courts have passed on issues similar to those that the plaintiff raises, I believe that it would appropriate to make some brief comments on these decisions without purporting to render a decision on the merits of this litigation."

Foley Decision p. 7,

> "In sum, the separate motions of the defendant are granted dismissing the complaint pursuant to the terms of the agreement that agreed to its discontinuance."

CONCLUSION

Memorandum-Decision*Order of J. Foley, dated February 26,1976, should be reversed and matter remanded to the Northern District Court to be heard on the issues as per the appellant's complaint as filed on May 22, 1975.

NB: Court is asked to review Lettko constant interchange of terms of "indefinite" and temporary suspension with the letter of "indefinite" suspension of Johnson on January 8, '75.

THE ENLARGED CITY SCHOOL DISTRICT OF TROY
BOARD OF EDUCATION

The D. P. Van Arnam Educational Campus
1950 Burdett Avenue
Troy, New York 12180

January 8, 1975

Mr. Albert E. McFerran, Jr.
Troy High School
Troy, New York 12180

Dear Mr. McFerran:

In view of your language on the morning of January 8, 1975 in the Troy High School Principal's Office regarding the matter of my letters to you of August 8, 1974 and January 3, 1975 I am suspending you from your position as a teacher in Troy High School effective this date. This suspension will be for an indefinite period and will be with pay.

You are to notify the Principal, Mr. Guy A. Enfanto, of your location and where you may be contacted within an hour's notice.

Very truly yours,

Sidney L. Johnson

Sidney L. Johnson
Superintendent

SLJ/rr

CC-Mr. Guy A. Enfanto
Miss Barbara Worcester

Exhibit I

Law Offices
DUGAN, CASEY, BURKE & LYONS
100 State Street
Albany, New York
HEmlock 6-7693

February 5, 1963

Richard R. Rowley, Esq.
Sneeringer & Rowley
11 North Pearl Street
Albany, New York

Re: Albert E. McFerran

Dear Dick:

We are forwarding you herewith letter of the above named together with his resignation duly signed and acknowledged.

It is understanding that the charges heretofore filed against Mr. McFerran which were scheduled for hearing on January 29, and adjourned to February 13, are discontinued without prejudice to either party.

Very truly yours,

DUGAN, CASEY, BURKE & LYONS
Joseph J. Casey

JJC/moc
Enc.

Exhibit II

To be Argued by
J. MICHAEL EADRY
State Education Building
Albany, New York 12234
(518-474-8932)
Estimated time for argument
(15 minutes)

STATE OF NEW YORK

Court of Appeals

In the Matter
of
The Application of UNION FREE SCHOOL DISTRICT NO. 2 OF THE TOWN OF CHEEKTOWAGA, ERIE COUNTY, NEW YORK, and ITS BOARD OF EDUCATION,

Petitioners-Appellants,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Respondent-Respondent,

and

RICHARD BIEBER, RICHARD KELSEY, THADDEUS LESNIAK and RAYMOND SCHMITT, individually and on behalf of all teachers similarly situated and the MARYVALE TEACHERS ASSOCIATION, an unincorporated association, by LOUIS FABIANO, its President,

Respondents-Respondents.

RESPONDENT COMMISSIONER'S BRIEF

ROBERT D. STONE, ESQ.
Attorney for Respondent Commissioner
Office & Post Office Address
State Education Building
Albany, New York 12234
(518-474-8932)

J. MICHAEL EADRY,
Of Counsel

Exhibit III

thirty-five hours since this would violate a city ordinance. This Court stated at page 147, that:

> That ordinance defines and determines the terms of the contract. This is obviously so when the contract itself is silent on the subject. Whether the ordinance is incorporated into the contract by reference or not is immaterial. Contract obligations are determined by the law in force when the contract is made. While the hours provision of the 1969 ordinance remained in effect, the former City Manager was powerless to execute a contract contrary to its terms. [citations omitted]

Additionally, the fact that the teacher's association may have bargained for the granting of transfer credits in violation of the Education Law is not relevant for it has been held on numerous occasions that a teacher may not waive statutory protections of law enacted for his protection. Consequently, in Matter of Boyd v. Collins, 11 NY 2d 228, an agreement waiving the benefits of the tenure law was held invalid on public policy grounds. Similarly, agreements which provided for less salary during summer months than was required by statute (Matter of Central School District No. 1 v. Nyquist, 63 Misc 2d 935; Matter of Board of Education of Union Free School District No. 3, Town of Hempstead v. Nyquist, 65 Misc 2d 154) were held to be illegal as violative of law and public policy. So it is clear from the Education Law that once transfer credit

is granted, it must be applied for all salary purposes. This point was affirmed by the Commissioner in a decision rendered as early as July 22, 1969 (Matter of Ladd, 9 Ed. Dept. Rep. 3, Decision No. 8017). The appellant board must be deemed to have knowledge of the Education Law as well as the decisions of the Commissioner.

131 Clermont Street
Albany, New York
January 30, 1977

A Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
U.S. Court House
Foley Square
New York, New York 10007

FEB 1 1977

DN 76-7181

RE: McFerran v. Brd of Education and Nyquist

Attention: V.A. Carlin, Chief Deputy Clerk

Dear Sir:

Enclosed please find #8 copies of my REPLY to the appellee Briefs of the respondent School Board, Enlarged City School District of Troy, N.Y., and the respondent Commissioner of Education.

Sincerely,

Albert E. McFerran
Appellant, Pro Se

cc: Lettko
Stone
Attorney General